still survived and carried on business as such and there was therefore no legal change of the business and section 13 of the Redundancy Payments Act did not apply.

Under the circumstances Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 cannot in our view be construed to *deem* termination of the contract of employment of the appellants where there was only a change in the ownership of the shares of Rengo Malay Estate Sdn. Bhd.

We are of the view therefore that the conclusions of the Assistant Director and the appellate judge are correct. Appeal dismissed with costs.

Appeal dismissed.

Solicitors: *Lobo & Associates; Vohrah & Tan Chee Lan.*

PUBLIC PROSECUTOR v. ZAINUDDIN & ANOR.

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.) December 2 & 12, 1985]

[Kuala Lumpur – Supreme Court Criminal Reference No. 4 of 1985]

Criminal Law and Procedure – Summary trial – Whether Magistrate has power to order acquittal and discharge of accused without hearing evidence for the prosecution – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(c) & (f) & 376 – Federal Constitution, Art. 145(3).

In this case the respondents were first charged on November 9, 1976 but the case against them had been postponed no less than twelve times since then to the date when the magistrate ordered acquittal in their favour on January 19, 1984. The learned Deputy Public Prosecutor asked for revision of the decision but the application was turned down.

The Supreme Court granted leave to have the following question of law of public interest determined:–

"In view of Article 145(3) of the Federal Constitution and section 173(c) and (f) of the Criminal Procedure Code, whether it is right for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution."

Held: in a summary trial paragraphs (c) and (f) of section 173 of the Criminal Procedure Code do not empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

Cases referred to:

(1) *Public Prosecutor* v. *Mohamed Said* [1984] 1 M.L.J. 50.

(2) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

(3) *Public Prosecutor* v. *Goh Kee Chuan* [1967] 1 M.L.J. 174.

(4) *Public Prosecutor* v. *Mahmud* [1974]1 M.L.J. 85.

(5) *Chu Chee Peng* v. *Public Prosecutor* [1973]2 M.L.J. 35.

SUPREME COURT.

Mohtar bin Abdullah (Deputy Public Prosecutor for the appellant.

A.K.J. D'Cruz for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is a criminal reference under section 66 of the Courts of Judicature Act (Act 91) which arose from the decision of Magistrate, Seremban on January 19, 1984 ordering an acquittal and discharge of the respondents herein without hearing any evidence of the prosecution.

The learned Deputy Public Prosecutor applied to the High Court at Seremban for a revision of the decision but the application was turned down. Hence the order of the Magistrate stood.

Upon application by the learned Deputy Public Prosecutor, the Supreme Court granted him leave to have the following question of law of public interest determined:

"In view of Article 145(3) of the Federal Constitution and section 173 (c) and (f) of the Criminal Procedure Code, whether it is right in law for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution."

At our sitting on December 2, 1985 we answered the question in the negative and promised to give our written reason therefore. Hence this judgment.

The record of this case shows that the case has been postponed no less than twelve times since the respondents were first charged on November 9, 1976 to the date when the magistrate ordered acquittal in their favour on January 19, 1984, *i.e.* about eight years later. Of these twelve postponements, five were granted at the prosecution's request, two postponements because of the court's own inability to hold the trial, whilst the remaining

five postponements were granted at the behest of the defence.

The question which we have to answer here was whether a magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all.

Until the decision of Mohamed Azmi J. (as he then was) in *Public Prosecutor* v. *Mohamed Said.*[1] it was generally considered as settled law that the magistrate had no such powers. Murray-Aynsley J. in *Kuppusamy* v. *Public Prosecutor.*[2] held that the earliest stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J. in *Public Prosecutor* v. *Goh Kee Chuan*[3] and *Public Prosecutor* v. *Mahmud.*[4] This view was also accepted by the Federal Court, whose judgment was delivered by Ong C.J. in *Chu Chee Peng* v. *Public Prosecutor.*[5]

In *Chu Chee Peng*'s case the court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of autrefois acquit should the accused be subsequently re-charged for the same offence. The court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal –

(1) when after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (s.173(f)).

(2) when because the main prop of the prosecution case has prematurely collapsed, and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (s.254).

Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unable to proceed should only be a discharge not amounting to an acquittal.

However, this clear ruling was not followed by Mohamed Azmi J. (as he then was) in *Public Prosecutor* v. *Mohamed Said* (*supra*). The facts in that case were almost similar to those in the case under the present reference. In that case, because of the number of postponements and the inability of the prosecution to proceed due to the inavailability of two material witnesses, the accused was twice discharged by the magistrate. The first discharge was ordered after the trial had commenced and evidence of six witnesses was heard, whilst the second discharge which was stated to be amounting to an acquittal was ordered before any evidence was heard, at all. The second discharge was the result of the magistrate's refusal to allow the prosecution's application to postpone the trial. In other words, because of the inability of the prosecution to proceed with the trial, the magistrate ordered the accused to be acquitted.

The prosecution conceded in *Mohamed Said's* case that the decision of the magistrate refusing the postponement asked for was a correct one but disputed that the magistrate had the power to order a discharge amounting to an acquittal.

Mohamed Azmi J. disagreed with the prosecution's submission and upheld the ruling by the learned magistrate. In doing so he seemed to be preoccupied by a fear that if it were held that the magistrate was incapable of ordering an acquittal following his refusal to allow a postponement the prosecution would have been able to continue charging the accused for the third time or indeed as many number of times as there would be discharges. He saw the situation as a judicial prosecution confrontation – a deadlock which should be avoided and solved. As a measure to thwart the prosecution's "abuse of power" of repetitive re-charging he thought that the magistrate should have the power to deny the prosecution the right to re-charge the accused. He thus based his ratio upon a narrow construction of paragraph (c) of section 173 of the Criminal Procedure Code (CPC). This paragraph says:

> "If the accused refuses to plead or does not plead or claims to be tried, the court shall proceed to hear the complainant (if any) and to take *"all such evidence as may be produced in support of the prosecution case."*
>
> (Emphasis is ours)

He construed the emphasised phrase to mean only "all such *available* evidence as may be produced in support of the prosecution *at the trial"* (again the emphasis is ours), thereby excluding the evidence which is not so available, even though such evidence is material and needed by the prosecution

to support its case and as such a postponement is sought for in order to make it available. The result is, according to the learned judge's ruling that where material evidence (evidence in support of the prosecution) is not available at the trial the court may, by refusing adjourment, treat the case of the prosecution as at an end and acquit the accused under paragraph (f) of section 173 of the CPC.

We do not accept this narrow construction as it is plainly contrary to the wording of paragraph (f) which is as follows:

"If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal."

Under this paragraph an order of acquittal can be recorded only (1) when "all the evidence hereinbefore referred to" has been taken and (2) when the court finds no case against the accused "has been made out which if unrebutted would warrant his conviction ..."

When does the court make a finding as to whether a case against the accused is made out or not? Surely, at the close of the prosecution case. And what is the basis on which such a finding is made? The answer must be that the finding is made on the basis of "all the evidence hereinbefore referred to." Now what does this phrase mean? Whilst we accept the view of Mohamed Azmi J. in that whatever this phrase means it must bear the same meaning as does the phrase "all such evidence as may be produced in support of the prosecution case" appearing in paragraph (c), we do not however agree that these two phrases only mean "such evidence as is available at the trial." In our view, these phrases also include evidence not available on the date of the trial as long as such evidence is material and needed to support the prosecution case.

Yet, if we accept the narrow construction in *Mohamed Said's* case the court can acquit the accused at any stage irrespective of whether it has heard some evidence or none at all. Both cases – partly heard and not yet heard cases – are in the same position in that they run the risk of being frustrated by the court refusing an adjournment, necessitating the making of an order of acquittal if the evidence needed to support the prosecution case is not available on the day of the trial. This is plainly contrary to the decision in *Kuppusamy's* case.

In our view the court has no such power before the end of the prosecution case, whether the evidence has been given or not. The phrase "all such evidence as may be produced" appearing in paragraph (c) of section 173 of the CPC of course has the same meaning as the phrase "all the evidence hereinbefore referred to" appearing in paragraph (f). But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted.

This narrow ruling means that the court takes upon itself the power of deciding when the prosecution should end its case. Such consideration is not only not justified by the wordings of those two paragraphs but also clearly contrary to the provision of section 376 of the CPC and Articles 145(3) of the Constitution. Section 376 empowers the Attorney-General who is also the Public Prosecutor to control and give direction over and in respect of all criminal prosecutions and proceedings, whilst Article 145 (3) declares that "the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence,..."

Since the Attorney-General has this power exercisable at his discretion, it is not for the Court to say when the prosecution has to close its case or has to come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused, and thus acquit him on the basis of no evidence or on the basis of the evidence thus far produced without waiting for the evidence for which postponement is sought, citing as an authority a burden of proof principle that it is for the prosecution to prove the guilt of the accused. Of course, the prosecution has the duty to do so, but the Court has no power to stop the prosecution from performing its duty by acquitting without hearing evidence. Moreover this burden of proof principle will be applicable only when the prosecution has called all the evidence which it wishes to produce in support of its case, including the evidence which is not capable of being produced at the trial without the necessity of a postponement.

Of course, postponements whether they be refused or granted are always at the discretion of the court. Should it refuse a postponement, the deadlock which Mohamed Azmi J. had spoken about is not without solution. It could be solved

by continuous mutual respect and co-operation between the court, the prosecution and the defence. In ordering a discharge the court should not be unduly concerned about the possibility of subsequent re-arrest and re-charging. There is every possibility (one always hopes for the best) that the prosecution may wish to discontinue the proceeding as frequent re-arresting and re-charging would reflect badly on the conduct of the prosecution. In that event it may withdraw the charge or simply offer no evidence, or even enter a nolle prosequi. If, however, the prosecution is not prepared to discontinue the proceeding, as it might have a reason of public interest to continue and maintain it, there are only two options open to the Court – grant the postponement sought for or discharge the accused. If the court considers that a mere discharge does not meet with the justice of the case because the offence by reason of numerous postponements has become trivial and lost its potency and that the case should be disposed of quickly the court should make an order leaving the prosecution with no choice except to discontinue. Perhaps, a short adjournment or a last adjournment should be granted so as to enable the prosecution to make up its mind one way or the other. It might well be that in the end the prosecution may decide to discontinue. Thus, the co-operation and mutual respect between the bench and the bar in the administration of justice is so important that it should not be undermined.

A word of caution should be expressed here. Magistrates must appreciate that the refusal to postpone trials must inevitably result in the discharge of the accused and this power should therefore be used sparingly as a last resort only. It should not be ordered as an expression of anger and exasperation at or as a censure against the conduct of the prosecution. Failure to exercise this power judicially will lead to injustice and inconvenience to the accused – the very purpose for which power is exercisable. It is therefore necessary to consider the possibility of re-charge and weigh it with the convenience or otherwise which would be caused to the accused. There is no advantage to him if his discharge will result in his subsequent re-arrest, because by then his solicitor or counsel would have been discharged following his discharge by the court and therefore his solicitor or counsel has to be re-engaged, thus entailing additional expenses. The court's record no doubt would appear to be neat and tidy by the order of discharge but it does not solve the problem of the accused's liability and possibility of disadvantage and inconvenience that would be caused to him.

Anyone performing a judicial function naturally abhors at the idea of the prosecution re-charging a person who has just been discharged and released by the court. The possibility of conflict between the court and the prosecution as reflected in repetitive discharges and subsequent re-charges should not be solved by ascribing to the court the power which it has not or by giving it an upper hand so that it could stop and prevail over the prosecution in such conflict by ordering a discharge amounting to acquittal.

The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review. If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission, though anomalously he is a member of it. Members of the public expect that he exercises his power *bona fide* and professionally in that when he prefers a charge against an individual he does so because public interest demands that prosecution should be initiated and when he refrains from charging an individual or discontinues a prosecution already initiated he also acts upon the dictate of public interest.

In view of what we have said above, our answer to the question raised in this reference is that in a summary trial, paragraphs (c) and (f) of section 173 of the CPC do not empower the court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

Order accordingly.

Solicitors: *Stanley Ponniah Ng & Soo; A.K.J. D'Cruz & Co.*